

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

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INDIAN HARBOR INSURANCE COMPANY,	: Case No. 12 CIV 5787 (JGK)
	: ECF Case
	:
Plaintiff,	: <b>DECLARATION OF MAX H. STERN</b>
	: <b>IN SUPPORT OF INDIAN HARBOR</b>
-against-	: <b>INSURANCE COMPANY'S</b>
	: <b>MOTION FOR SUMMARY</b>
THE CITY OF SAN DIEGO,	: <b>JUDGMENT</b>
	:
	:
Defendant.	: Courtroom: 12B
	: Judge: Hon. John G. Koeltl
	:
	: Complaint Filed: July 27, 2012
	: F.A.C. Filed: August 14, 2012
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**DECLARATION OF MAX H. STERN IN SUPPORT OF INDIAN HARBOR  
INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT**

I, Max H. Stern, declare as follows:

1. I am an attorney at law admitted to practice before the courts of the State of California, am a partner in the law firm of Duane Morris LLP, and am a counsel of record for Plaintiff Indian Harbor Insurance Company ("Indian Harbor") in this matter, where I am admitted *pro hac vice*. The following facts are within my personal knowledge and if called as a witness, I could and would testify competently thereto.

2. Attached as **Exhibit 1** is a copy of the Indian Harbor insurance policy. In the Declaration of J. Robert McMahon ("McMahon Dec."), filed concurrently herewith, Mr. McMahon declares that Exhibit 1 is a true and correct copy of the Indian Harbor insurance policy. (McMahon Dec. ¶ 3.)

3. Attached as **Exhibit 2** is a copy of the August 13, 2009 "Claim Against the City of San Diego" by The Grande North at Santa Fe Place Homeowners Association. In an April 17, 2012 letter to my office from the City's Chief Deputy City Counsel (Christine Leone), Ms. Leone attached "various documents from the Risk Management Department relating to the Grande North matter." The August 13, 2009 "Claim Against the City of San Diego" was one of

the documents included, and a true and correct copy of this document is attached here as Exhibit

2. Pursuant to the Request for Judicial Notice filed concurrently herewith, Indian Harbor requests the Court take judicial notice of this document.

4. Attached as **Exhibit 3** is a copy of the City's August 24, 2009 denial of the Grande North claim because it was "not presented within the 6 (six) months after the event or occurrence as required by law." In an April 17, 2012 letter to my office from Ms. Leone, she attached "various documents from the Risk Management Department relating to the Grande North matter." The August 24, 2009 claim denial was one of the documents included, and a true and correct copy of this document is attached here as Exhibit 3. Pursuant to the Request for Judicial Notice filed concurrently herewith, Indian Harbor requests the Court take judicial notice of this document.

5. Attached as **Exhibit 4** is a copy of the September 9, 2009 letter from counsel for the Grande North HOA to the City, wherein counsel advised regarding "a potentially deadly condition emanating from the City property." In an April 17, 2012 letter to my office from Ms. Leone, she attached "various documents from the Risk Management Department relating to the Grande North matter." The September 9, 2009 letter was one of the documents included, and a true and correct copy of this document is attached here as Exhibit 4.

6. Attached as **Exhibit 5** is a copy of the City's September 29, 2009 letter reiterating its denial of the claim. In an April 17, 2012 letter to my office from Ms. Leone, she attached "various documents from the Risk Management Department relating to the Grande North matter." The September 29, 2009 letter was one of the documents included, and a true and correct copy of this document is attached here as Exhibit 5. Pursuant to the Request for Judicial Notice filed concurrently herewith, Indian Harbor requests the Court take judicial notice of this document.

7. Attached as **Exhibit 6** is a true and correct copy of excerpts of the docket from the underlying Grande North lawsuit that show the filing dates of the pleadings in the Grande North matter referenced below. This docket was obtained by going to the Superior Court of California,

County of San Diego website (at [www.sdcourt.ca.gov](http://www.sdcourt.ca.gov)), accessing “Register of Actions,” entering in the case number for the Grande North lawsuit, and printing up relevant pages. My office accessed and printed up the docket for the Grande North matter on February 1, 2013. The notations on the docket indicate those docket numbers that we requested be retrieved, as discussed in Paragraph 8, below.

8. Attached as **Exhibit 7** is a true and correct copy of the Complaint in the Grande North matter filed against the City and other defendants on September 9, 2009. This document was obtained by using Westlaw Court Express, a document retrieval and court research service offered through Thomson Reuters. Our office instructed Westlaw Court Express to retrieve the docket entries that are referenced on the docket attached hereto. We are advised by Westlaw Court Express that there is no filed-endorsed stamp on this document because it was electronically filed. Pursuant to the Request for Judicial Notice filed concurrently herewith, Indian Harbor requests the Court take judicial notice of this document.

9. Attached as **Exhibit 8** is a true and correct copy of the Proof of Service of Summons on the City in the Grande North matter. Please see paragraph 8 regarding how this document was obtained. Pursuant to the Request for Judicial Notice filed concurrently herewith, Indian Harbor requests the Court take judicial notice of this document.

10. Attached as **Exhibit 9** is a true and correct copy of the City’s Answer in the Grande North matter. Please see paragraph 8 regarding how this document was obtained. Pursuant to the Request for Judicial Notice filed concurrently herewith, Indian Harbor requests the Court take judicial notice of this document.

11. Attached as **Exhibit 10** is a true and correct copy of the First Amended Complaint in the Grande North matter. Please see paragraph 8 regarding how this document was obtained. Pursuant to the Request for Judicial Notice filed concurrently herewith, Indian Harbor requests the Court take judicial notice of this document.

12. Attached as **Exhibit 11** is a redacted version of an October 19, 2011 memorandum from the Office of the City Attorney of the City of San Diego to California State

Association of Counties Excess Insurance Authority wherein the City states that the Grande North HOA was seeking \$29 million in damages. On May 24, 2012, the City sent my office a letter that enclosed various information, including this memorandum, a true and correct copy of which is attached as Exhibit 11.

13. Attached as **Exhibit 12** is a true and correct copy of the Second Amended Complaint in the Grande North matter. Please see paragraph 8 regarding how this document was obtained. Pursuant to the Request for Judicial Notice filed concurrently herewith, Indian Harbor requests the Court take judicial notice of this document.

14. Attached as **Exhibit 13** is a copy of a March 26, 2012 email between XL (who was assigned by Indian Harbor to handle this matter) and the City's broker. Mr. McMahon declares that Exhibit 13 is a true and correct copy of this document. (McMahon Dec. ¶ 6.)

15. Attached as **Exhibit 14** is a copy of an April 4, 2012 letter from XL to the City. Mr. McMahon declares that Exhibit 14 is a true and correct copy of this document. (McMahon Dec. ¶ 6.)

16. In response to this letter, in an April 17, 2012 letter the City provided my office with "various documents from the Risk Management Department relating to the Grande North matter," in addition to 23 CDs containing the City's production in the Grande North matter, bates range 1 to 37,050. The City provided a CD of pleadings to our office in an April 19, 2012 letter. In a May 4, 2012 letter, our office sent the City a follow-up letter regarding some of the requests for information set forth in XL's April 4, 2012 letter and requested additional documents. On May 24, 2012, the City provided my office with additional information, including an additional 25 CDs in response to those requests, totaling more than 60,000 pages.

17. Attached as **Exhibit 15** is a copy of XL's July 27, 2012 denial of coverage to the City. Mr. McMahon declares that Exhibit 15 is a true and correct copy of this document. (McMahon Dec. ¶ 7.)

18. Attached as **Exhibit 16** is a copy of the May 19, 2011 "Claim Against the City of San Diego" in the 235 On Market matter. Mr. McMahon declares that Exhibit 16 is a true and

correct copy of this document, sent by the City to Indian Harbor on June 7, 2012. (McMahon Dec. ¶ 8.) Pursuant to the Request for Judicial Notice filed concurrently herewith, Indian Harbor requests the Court take judicial notice of this document.

19. Attached as **Exhibit 17** is a copy of the City's June 23, 2011 denial of the 235 On Market claim. Mr. McMahon declares that Exhibit 17 is a true and correct copy of this document, sent by the City to Indian Harbor on June 7, 2012. (McMahon Dec. ¶ 8.) Pursuant to the Request for Judicial Notice filed concurrently herewith, Indian Harbor requests the Court take judicial notice of this document.

20. Attached as **Exhibit 18** is a true and correct copy of excerpts of the docket from the underlying 235 On Market lawsuit that show the filing dates of the pleadings in the 235 On Market matter referenced below. This docket was obtained by going to the Superior Court of California, County of San Diego website (at [www.sdcourt.ca.gov](http://www.sdcourt.ca.gov)), accessing "Register of Actions," entering in the case number for the 235 On Market lawsuit, and printing up relevant pages. My office accessed and printed up the docket for the 235 On Market matter on February 1, 2013. The notations on the docket indicate those docket numbers that we requested be retrieved, as discussed in Paragraph 8, above.

21. Attached as **Exhibit 19** is a true and correct copy of the Complaint in the 235 On Market matter filed on September 2, 2011. Please see paragraph 8 regarding how this document was obtained. Pursuant to the Request for Judicial Notice filed concurrently herewith, Indian Harbor requests the Court take judicial notice of this document.

22. Attached as **Exhibit 20** is a true and correct copy of the Proof of Service of Summons on the City of the 235 On Market matter, showing that service was made on the City on September 9, 2011. Please see paragraph 8 regarding how this document was obtained. Pursuant to the Request for Judicial Notice filed concurrently herewith, Indian Harbor requests the Court take judicial notice of this document.

23. Attached as **Exhibit 21** is a true and correct copy of the City's October 4, 2011 Answer in the 235 On Market lawsuit. Please see paragraph 8 regarding how this document was

obtained. Pursuant to the Request for Judicial Notice filed concurrently herewith, Indian Harbor requests the Court take judicial notice of this document.

24. Attached as **Exhibit 22** is a copy of a May 25, 2012 email to XL from the City's broker, providing Indian Harbor first notice of the 235 On Market claim. Mr. McMahon declares that Exhibit 22 is a true and correct copy of this document. (McMahon Dec. ¶ 8.)

25. Attached as **Exhibit 23** is Indian Harbor's June 7, 2012 acknowledgment of receipt of the City's notice of the 235 On Market matter. Mr. McMahon declares that Exhibit 23 is a true and correct copy of this document. (McMahon Dec. ¶ 8.)

26. Attached as **Exhibit 24** is Indian Harbor's July 27, 2012 denial of coverage to the City. Mr. McMahon declares that Exhibit 24 is a true and correct copy of this document. (McMahon Dec. ¶ 9.)

27. Attached as **Exhibit 25** is a true and correct copy of excerpts of the docket from the underlying lawsuit filed by Element Owner Association lawsuit filed against Centex Home, Centex Real Estate Corporation, Centex Construction Company, Inc., and Balfour Beatty Construction Company (collectively, "Centex") and others, that reflect the filing dates of the pleadings in this matter discussed below. This docket was obtained by going to the Superior Court of California, County of San Diego website (at [www.sdcourt.ca.gov](http://www.sdcourt.ca.gov)), accessing "Register of Actions," entering in the case number for the Element Owner Association lawsuit, and printing up relevant pages. My office accessed and printed up the docket for the Element matter on February 1, 2013. The notations on the docket indicate those docket numbers that we requested be retrieved, as discussed in Paragraph 8, above.

28. Attached as **Exhibit 26** is a true and correct copy of the Complaint in the Element Owner Association lawsuit, filed on April 17, 2009. Please see paragraph 8 regarding how this document was obtained. Pursuant to the Request for Judicial Notice filed concurrently herewith, Indian Harbor requests the Court take judicial notice of this document.

29. Attached as **Exhibit 27** is a copy of the March 28, 2012 "Claim Against the City of San Diego" by Centex. Mr. McMahon declares that Exhibit 27 is a true and correct copy of

this document. (McMahon Dec. ¶ 10.) Pursuant to the Request for Judicial Notice filed concurrently herewith, Indian Harbor requests the Court take judicial notice of this document.

30. Attached as **Exhibit 28** is the City's April 9, 2012 notice of insufficiency with respect to the Centex claim. Mr. McMahon declares that Exhibit 28 is a true and correct copy of this document. (McMahon Dec. ¶ 10.) Pursuant to the Request for Judicial Notice filed concurrently herewith, Indian Harbor requests the Court take judicial notice of this document.

31. Attached as **Exhibit 29** is the City's May 11, 2012 denial of the Centex claim. Mr. McMahon declares that Exhibit 29 is a true and correct copy of this document. (McMahon Dec. ¶ 10.) Pursuant to the Request for Judicial Notice filed concurrently herewith, Indian Harbor requests the Court take judicial notice of this document.

32. Attached as **Exhibit 30** is an Order from the Court, denying Centex relief from the claim requirement and denying Centex leave to file a cross-complaint against the City. Please see paragraph 8 regarding how this document was obtained. Pursuant to the Request for Judicial Notice filed concurrently herewith, Indian Harbor requests the Court take judicial notice of this document.

33. Attached as **Exhibit 31** is a copy of a May 25, 2012 email to XL from the City's broker, providing first notice of the Centex claim. Mr. McMahon declares that Exhibit 31 is a true and correct copy of this document. (McMahon Dec. ¶ 10.)

34. Attached as **Exhibit 32** is Indian Harbor's June 7, 2012 acknowledgment of receipt of the City's notice of the Centex claim. Mr. McMahon declares that Exhibit 32 is a true and correct copy of this document. (McMahon Dec. ¶ 10.)

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35. Attached as **Exhibit 33** is Indian Harbor's July 27, 2012 denial of coverage to the City. Mr. McMahon declares that Exhibit 33 is a true and correct copy of this document.

(McMahon Dec. ¶ 9.)

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 1st day of February 2013, at San Francisco, California.

/s/ Max H. Stern

Max H. Stern

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